No. 85-1035

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

CROCKER NATIONAL BANK,

Appellant,

v.

PAUL PERDUE,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF OF THE CALIFORNIA BANKERS CLEARING HOUSE ASSOCIATION, *AMICUS CURIAE*, IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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This brief is filed under Rule 36.1 of the Rules of this Court with the consent of all the parties.

Interest of *Amicus Curiae*

The California Bankers Clearing House Association is an association of eight major commercial banks in the State of California which clears checks and other commercial items in the State.[1] Through its counsel, the Association

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[1] The members of the Association are Bank of America National Trust and Savings Association, The Bank of California, N.A., Crocker National Bank, First Interstate Bank of California, Lloyds Bank California, Security Pacific National Bank, Union Bank, and Wells Fargo Bank, N.A.

regularly appears as *amicus curiae* before this Court and other appellate courts in cases raising significant legal questions relating to banking. The Association has a strong interest in the Court's exercising plenary jurisdiction over this appeal and preventing the State of California from engaging in rate regulation of national banks without warrant under any act of Congress.

Summary of Argument

The decision below rests on the proposition that the States possess rate regulatory authority over national banks, entities organized and existing solely by reason of federal authority and empowered by Congress to conduct the business of commercial banking. The pretense that California proposes to do no more here than apply "the common law governing all commercial transactions" (JS 36a) is spurious.[2]

The States, including California, possess no independent regulatory authority over the rates charged by national banks for banking services. Only to the extent Congress has chosen expressly to incorporate state law into federal law can the States control the banking operations of national banks. Any other application of state regulatory law is inconsistent with federal supremacy. Since Congress has not adopted state law with respect to regulation of deposit account charges, California law does not govern such charges.

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[2] The jurisdictional statement and its appendix are cited as "JS" with a page number; "JS —a" citations are to the appendix.

ARGUMENT

The jurisdictional statement shows that the provisions of state statutory law applied to national banks by the decision below conflict with the power of national banks to receive deposits pursuant to 12 U.S.C. § 24 (Seventh) (JS 8-13), with the Comptroller's exclusive regulatory power over national banks under 12 U.S.C. § 484 (JS 14-17) and with national policy regarding the pricing of banking services (JS 17-22). Each of these propositions is fully explicated in the jurisdictional statement, is clearly correct, and requires no restatement here; each is as well an adequate warrant for the exercise of the Court's jurisdiction and reversal of the decision below. We suggest here an additional and fundamental ground that calls for the Court to act to sustain federal authority against the claim of power made by California: California lacks regulatory power over the banking business of national banks *ab initio*, whether or not Congress has affirmatively acted so as to occupy the field within which a particular form of regulation falls or has provided a federal directive in conflict with state law. This conclusion follows from the status of national banks as creatures of federal authority established to conduct the business of commercial banking.

I.

The Power Claimed by California Is Regulatory.

The California Supreme Court has directed that a state trial court determine whether certain deposit account charges of a national bank are "unreasonable." As a part of that "adjudication," the trial court apparently is to consider whether a national bank demand deposit account agreement is a "contract of adhesion" (JS 8a), the national

bank's "basis and justification" for the charges challenged (JS 11a), whether retail banking in California is a "freely competitive market" or an "oligopoly" (*id.*), the national bank's "cost" of providing the services (*id.*), and the "true value" of the national bank's services (*id.*). Such an inquiry is said to be called for by provisions of California statutory law which in turn are said to be "part of the common law governing all commercial transactions" and which "*regulate* not only [the] sale of bank services but the sale of groceries, automobiles, furniture or medical services" (JS 36a) (emphasis added).

Thus, the California court concluded that this case involved nothing more than the application of ordinary principles of contract law to the contracts of national banks and was controlled by such decisions of this Court as *National Bank* v. *Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869), and *McClellan* v. *Chipman*, 164 U.S. 347, 357 (1896) (see JS 27a). Whatever the current law of California may be (see JS 10a-11a), however, it has not generally been thought in this country that judicial review and revision of prices to insure their "reasonableness" is part of the law of contracts. Rather, when the law—state or federal—has sought to displace the market in the determination of prices it has done so by the statutory establishment of particular standards to be administered by agencies created for that purpose, and such action has normally been limited to industries classed as public utlities and granted some form of monopoly.[3] The law of contracts has never been thought to service this function—its purpose is instead to

[3] Applications of price regulation beyond the public utility field have occurred in times of war or other emergency, and in recent years with respect to energy prices and, in a few localities, residential rents. In each instance, specific legislation has been enacted for a particular reason and with carefully articulated standards.

provide neutral rules producing certainty and protecting expectations in the conduct of commerce.

As we show below, California could not by a specific statutory scheme regulate national bank deposit account charges, and it cannot achieve the same end by calling such regulation "contract law." This Court is not bound by a state court's characterization of state law when determining whether a State has intruded on federal prerogatives, *see First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339, 347 (1968); *Society for Savings* v. *Bowers*, 349 U.S. 143, 151 (1955), and, like a rose, regulation by any other name is regulation.

II.

California Has No Regulatory Authority Over National Banks.

We do not dispute the settled proposition that national banks are "governed in their daily course of business far more by the laws of the State than of the nation." *National Bank* v. *Commonwealth, supra*, 76 U.S. (9 Wall.) at 362 (see JS 27a). State health and safety laws (such as building and fire codes, elevator inspection requirements, health codes for employee cafeterias, etc.), so long as uniform in their application, apply to national banks as to other commercial enterprises because they do not affect the functioning of national banks as banks and because Congress has not chosen to supply a body of federal law to give effect to these necessary exercises of police power. The same is true with respect to construction and enforcement of the contracts made by national banks. *Id.*[4]

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[4] Consequently, as the California Court noted (JS 28a-29a), article 4 of the Uniform Commercial Code, governing the contract

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In contrast, state authority to regulate the banking business of national banks as such is wholly inconsistent with the fact that national banks are creatures of federal power —a power unquestioned since *M'Culloch* v. *Maryland,* 17 U.S. (4 Wheat.) 316 (1819), *see Franklin National Bank* v. *New York,* 347 U.S. 373, 375 (1954). This is so whether or not national banks as they exist today are federal "instrumentalities" in the same sense as was the Second Bank of the United States. *See First Agricultural National Bank* v. *State Tax Commission, supra,* 392 U.S. at 340-41; *id.* at 354-58 (Marshall, J., dissenting).

Congress has for over a century legislated with respect to national banks on the premise that these creatures of its power are governed in the fundamentals of their banking operations exclusively by its own acts. Congress has clearly presumed that state law regulating the provision of banking services, the price of those services, the location of banking offices and the interstate expansion of banking operations is to be applied to national banks only if incorporated into federal law by Congress itself.

The Court recognized Congress's established practice of applying state law to the operations of national banks, when it chooses to do so, by means of express adoption when the Court struck down a state restriction on advertising as applied to national banks in *Franklin National Bank* v. *New York, supra.* The Court held, "We find no indication that

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rights and liabilities of parties to the bank deposit and collection process, applies to the contracts of national banks, as does article 3 of the Code, which governs negotiable instruments. These provisions are paradigms of neutral rules that facilitate commerce by providing certainty and protecting expectations. Even such provisions cannot be applied, however, to frustrate federal policy. *D'Oench, Duhme & Co.* v. *FDIC,* 315 U.S. 477, 455-59 (1942); *see also Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. 63, 68 (1966).

Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances." 347 U.S. at 378; *see id.* n.7.

Thus, Congress has made state usury laws, with specified exceptions, applicable to the interest charges of national banks by what is now 12 U.S.C. § 85 and its predecessor, R.S. § 5197. Congress has subjected national banks to state branching laws by the McFadden Act, 12 U.S.C. § 36(c) (1982). Congress has by the Douglas Amendment, 12 U.S.C. § 1842(d) (1982), subjected the acquisition of national banks by out-of-state bank holding companies to the laws of each State governing such acquisition of state banks.

The wording of Section 85 of the National Bank Act and of both the McFadden Act and the Douglas Amendment is quite instructive as to Congress's understanding of the limits of state authority: Section 85 provides that national banks may charge interest "at the rate allowed" by state law "and no more, except that where by the laws of any State a different rate is limited for *banks organized under State laws,* the rate so limited shall be allowed" for national banks (emphasis added). Similarly, the McFadden Act provides that a national bank may establish and operate new branches "if such establishment and operation are at the time authorized to *State banks* by the statute law of the State in question . . . subject to the restrictions as to location imposed by the law of the State on *State banks*" (emphasis added). The Douglas Amendment provides that an out-of-state bank holding company may not acquire a bank, national or state, in a State "unless the acquisition of . . . *a State bank* by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located . . ." (emphasis added).

It is clear from the reference in each statute to state law as governing *state* banks that Congress presupposed that the States have regulatory authority only over state banks and that only Congress itself could place national banks under similar strictures.[5] Indeed, if the States had general regulatory jurisdiction over national banks, each of the congressional actions described above would have been superfluous and Congress could have achieved its purposes by a single, simple provision preventing state discrimination against national banks.

In a similar context, that of federal savings and loan associations, the Court recently observed that if those federally created entities "were expected to conform to state law except where explicitly pre-empted in the Act itself, the provisions incorporating specific aspects of state law were needlessly repetitive." The Court continued, "we decline to construe the Act so as to render these provisions nugatory, 'thereby offending the well-settled rule that all parts of a statute, if possible, are to be given effect.'" *Fidelity Federal Savings & Loan Association* v. *De la Cuesta,* 458 U.S. 141, 163 (1982).[6]

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[5] The legislative histories of these statutes evidence this assumption. For example, Senator Bricker during debate on the Douglas Amendment said:

> "The National Bank Act recognizes the exclusive jurisdiction of the Federal Government over national banks just as the States have exclusive jurisdiction over State banks. The branch banking law is cited as a precedent for *giving* powers to States over national banks. The branch-banking law is the only major exception to the general rule that the Federal Government has exclusive jurisdiction over national banks."

102 Cong. Rec. 6861 (1956) (emphasis added).

[6] While the question posed in *Fidelity* arose from a conflict between a federal administrative regulation and a general rule of state

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This Court's consistent decisions to the effect that "the States are without power, unless authorized by Congress, to tax federally created, or, as they are presently called, national, banks," *see First Agricultural National Bank* v. *State Tax Commission, supra,* 392 U.S. at 340, are squarely on point. Indeed, state power to impose uniform, nondiscrimatory sales and use taxes on national banks is considerably less of an intrusion on the performance of banking functions than is California's claim of power to regulate rates—even if California purports to extend similar rate regulation to every aspect of its economy.

The only decision of this Court even arguably suggesting broad state regulatory jurisdiction over national banks is *First National Bank* v. *Missouri,* 263 U.S. 640 (1924). There the Court held, with three Justices dissenting, *id.* at 662-68, that Missouri could enforce against a national bank in its own courts its own statutory prohibition against the establishment of branches, *id.* at 659-60. The Court first determined, however, that federal law itself did not allow national banks to establish branches, *id.* at 656-59, so the actual question of state authority was indeed a peculiar and limited one—*i.e.,* whether a State could enforce a prohibition of its own that was not merely consistent with, but in fact duplicative of, federal law.

Moreover, the majority opinion in the *Missouri* case, while relying on broad language from the 1896 decision in *McClellan* v. *Chipman, supra, see* 263 U.S. at 656, did not distinguish, overrule or even take note of the line of deci-

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property and contract law, not from a claim of state regulatory power over federal entities (and thus the issue was one of preemption, not lack of state power *ab initio*), the Court followed the observation quoted above with a reference to the holding of *Franklin National.*

sions relied upon by the dissent, *see id.* at 663-65, which both antedated and followed *McClellan*: *e.g., Farmers' & Mchanics' National Bank* v. *Dearing,* 91 U.S. 29, 31-34 (1875); *Easton* v. *Iowa,* 188 U.S. 220, 229-30, 237-39 (1903). This omission vitiates the authority of the *Missouri* majority opinion, for the continuing validity of *Dearing* was reaffirmed only eight years ago by a unanimous Court. In *Marquette National Bank* v. *First of Omaha Service Corp.,* 439 U.S. 299, 308 (1978), the Court said:

> "Omaha Bank is a national bank; it is an 'instrumentalit[y] of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States.' *Davis* v. *Elmira Savings Bank,* 161 U.S. 275, 283 (1896). The interest rate that Omaha Bank may charge in its BankAmericard program is thus governed by federal law. See *Farmers' & Mechanics' Nat. Bank* v. *Dearing,* 91 U.S. 29, 34 (1875)."

First National Bank v. *Missouri* simply cannot be viewed as correct in light of this Court's other decisions and of consistent congressional understanding to the contrary.[7]

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[7] The legislative history of the McFadden Act expressly shows that Congress was well aware of the *Missouri* decision, *see, e.g.,* 67 Cong. Rec. 2841-42, 2859-60 (1926) (remarks of Reps. Nelson and Celler), yet still considered it to be solely within the power of the federal government to regulate the branching of national banks, *see, e.g.,* 67 Cong. Rec. 3240, 9291 (1926) (remarks of Rep. McFadden and Sen. Shipstead).

The holding of *First National Bank* v. *Missouri* is also no longer valid on its facts for the additional reason that the Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, 80 Stat. 1028, delegated exclusive enforcement authority over national banks to the Comptroller of the Currency. *See National State Bank* v. *Long,* 630 F.2d 981, 988 (3d Cir. 1980); *see also Conference of Federal Savings & Loan Associations* v. *Stein,* 604 F.2d 1256 (9th Cir. 1979), *aff'd summarily,* 445 U.S. 921 (1980).

In sustaining the power of the State to regulate national bank deposit account charges, the California court did not address the foregoing analysis. Instead, it advanced a broad reading of the holding in *McClellan* v. *Chipman, supra* (JS 27a), a restriction of *Franklin National* to regulations that might deter consumers from making deposits (JS 29a-31a), and a reference to the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 ("DIA of 1980"), and its legislative history as showing that Congress had not "intended by silence to preempt all state laws regulating charges in contracts between banks and depositors" (JS 32a and n.37).

McClellan v. *Chipman,* like any other decision, cannot be abstracted from its facts and made to do duty as a sweeping acknowledgement of state regulatory authority over national banks. The statute there in question was a typical act nullifying fraudulent conveyances; it did not become a regulation of banking when applied to banks, and it did not affect the essentials of the banking business—banking offices, banking services and banking charges. While the California court would have it that the state law here in question is of the same character as that in *McClellan,* the undeniable fact is that if that law is applied to charges in respect of a bank's deposit accounts, that law is being applied as a regulation of banking itself.

Likewise, *Franklin National* can hardly be limited to regulations that a state court views as deterring deposits. Indeed, a paraphrase of words from the holding of *Franklin National* shows its direct application here: it is impossible to believe that Congress authorized national banks to engage in the business of accepting demand deposits (one of the basic functions of a national bank) but, without any "affirmative indication," caused that authority to be subject to state control of the economic terms on which those de-

posits are accepted, whether those terms are service charges, minimum balance requirements, or interest payments on average balances. *See* 347 U.S. at 377-78.

Finally, the California court's reliance on a non-preemption provision in the DIA of 1980 proceeds from a false premise. That provision, § 501(b)(4), 94 Stat. 162, is a carve-out from a broad preemption of mortgage rates charged by *all* depository institutions, § 501(a), 94 Stat. 161-62, not just national banks. As noted above, national banks are not subject to state interest-rate regulation in the first place; rather 12 U.S.C. § 85 adopts state interest rate limitations, with certain exceptions, as *federal law* governing national banks. Thus, the limitation on preemption in Section 501(b)(4) says nothing about state regulatory authority over the charges of national banks in the absence of express congressional adoption or delegation.

Congress has not made state law regulating bank deposit account charges applicable to national banks, and, therefore, state law does not so apply. Were Congress ever to consider adopting state law as governing the operations of national banks in this respect, it is inconceivable that it would as well permit the regulatory mechanism California has chosen—after-the-fact class action litigation seeking hundreds of millions of dollars of damages on the theory that charges imposed for years in accordance with a bank's standard contracts and practices are "unreasonable" or "unconscionable" in amount. Indeed, this Court has held that, at least in the penal context, federal legislation prohibiting the making of "any unjust or unreasonable rate or charge" is unconstitutionally vague and the equivalent of a statute precluding "all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921).

CONCLUSION

For the reasons stated, this Court should exercise its plenary jurisdiction to review and reverse the judgment of the Supreme Court of the State of California.

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